

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 456 of 2001
with
CIVIL APPLICATION No 12242 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the Civil Judge? : NO

DR.P A SHUKLA

Versus

DHIRUBHAI KARSANBHAI THAKKER

Appearance:

1. Appeal from Order No. 456 of 2001
MR HV GADHVI for Petitioners No. 1-2
MR DP KINARIWALA for Respondents No. 1-3
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CORAM : MR.JUSTICE SHARAD D.DAVE

Date of decision: 14/12/2001

C.A.V. JUDGEMENT

Heard Ld. Advocates for the parties. Being aggrieved and dissatisfied with the order dtd. 15.10.2001, passed

by the Ld. City Civil Judge, Court No.12, Ahmedabad below exh. 5 & 6 in Civil Suit No. 4752 of 2001, the petitioner/original plaintiffs have preferred this appeal from order under Sec. 104 read with order 43 Rule 1 of C.P.C.

2. While deciding this appeal from order, the following question arises before me for consideration;

(i) Whether the Trial Court has powers to grant any interim relief to other side under Order 39 Rule 4 of the Civil Code, when there is no prayer made in the prayer clause ?

(ii) Whether the defendant has to take out the fresh notice of motion to obtain any order against the plaintiff under Order 39 Rule (8) read with Sec. 6 and 7 of the Civil Procedure Code ?

3. With the consent of the advocates for the parties, the appeal is heard finally. The case of the petitioners/original plaintiffs in nut shell are as under:-

The petitioners had filed a Civil Suit bearing No. 4752 of 2001 before the City Civil Court, Ahmedabad, to take out the notice of motion against the present respondents/original defendants, restraining them from putting gate or constructing a wall or causing any kind of obstructions or hindrances, on the land, which is used by the school, wherein, the present plaintiffs are the teachers. The school is situated at Prabhupark Society, Opp. Ramji Mandir, Punit Marg, Maninagar, Ahmedabad.

4. It is the case of the plaintiffs that the road leading to the school is a public road and is used by the respondent society for ingress and egress, including the school students who are parking their vehicles i.e. two wheelers and cycles near the compound wall of the school. It is the case of the plaintiffs that initially the order was passed in favour of the plaintiffs in view of the prayer of the plaintiffs made in the notice of motion at exh. 5. The Trial Court, at the time of hearing has modified the order and permitted the defendants to construct the wall and gate in front of the society and also restraining the students from bringing and parking their vehicles near the compound wall of the school. However, in case of emergency, the police vehicles, ambulance van or Govt. vehicles are allowed to be

brought in. Being aggrieved and dissatisfied with the order dtd. 6.11.2001, passed below exh. 5 & 6, the present appeal is preferred by the present petitioners.

5. At the time of preferring this appeal, the Ld. Advocate for the petitioners Mr. H.V. Gadhavi, contended that, the petitioners are the office bearers of Rubes Parents Teachers Association. The school authority has employed two chawkidars to see that the vehicles of the students and staff are parked in such a way so that the other occupiers of the society may not be disturbed. The said road, leading to the school, is a public road and therefore, the teachers and the students are allowed to take their vehicles without causing hindrance. It was further contended by the Ld. advocate for the plaintiffs that there is an end of the road near the school premises and therefore, if the students and teachers are restrained from taking their vehicles inside, they will be compelled to park their vehicles on the main road. This road is being used by the school students and the staffs since last 35 years. The Ld. Trial Judge has failed to appreciate the evidence produced on record and has also failed to apply the principles of natural justice.

6. It is the case of the plaintiffs that, since last so many years, the petitioners and students are bringing their vehicles and cycles in the society and thereby they have got the right by way of prescription or by way of right of adverse possession. The Ld. Trial Judge has also further erred in granting relief that, the defendants have been permitted to construct the wall and the gate in front of the society. It was vehemently argued by the Ld. Advocate Mr. Gadhavi for the appellant/original plaintiffs that no prayer was claimed by the respondents/original defendants in the prayer clause of the application filed under O. 39 R. 4, of the C.P.C. The Court has exceeded its jurisdiction in allowing the prayer by ordering and modifying the final order passed in notice of motion below exh. 5 and 6. If such prayer is allowed to be kept in force, the defendants who are not the office bearers of the society, may take law in their hands and even may not open the gate and thereby, may not allow the school to run.

7. It is the case of the appellants/plaintiffs, that on perusal of the application under O. 39, R. 4 of the CPC. it appears that the defendants have haphazardly, drafted the application and prayed in the application which cannot be granted at all. Order 39, Rule 4 of the CPC is in respect of "the order for injunction to be

discharged, to be varied or set aside in certain circumstances." Ld. Trial Court has erred by granting prayer in favour of the respondents/original defendants though no prayer is claimed in application exh. 16 under O.39 R. 4. of the CPC.

8. It was contended by the Ld. Advocate for the appellants/original plaintiffs that if the defendants are permitted to construct the wall and gate in front of the society, and will not allow the cycle and scooters to be brought near the school compound wall the scooters and cycles will be parked on road, and may create more hinderance for the students community and sometimes it may lead to grave accident. Therefore, also, the injunction granted in favour of the defendants be vacated forthwith.

9. Against the aforesaid submissions made by Mr. Gadhavi, L.A. for the appellants, Mr.Kinariwala, Ld. Advocate for the respondent/original defendants submitted that, before the Learned Trial Court, the defendants fairly agreed to allow the students to enter the society to attend the school premises, without allowing the students and teachers to bring their cycles and vehicles inside the society. The Ld. advocate for the defendants submits that, the students are parking their cycles inside the society near the compound wall of the school as per their wish and thereby hindering the way of ingress and egress to the members of the society. It is further submitted by the Learned Advocate Mr. Kinariwala, that there is an averments in application exh. 16 made by the defendants that they may be permitted to construct the wall and gate and accordingly, the Court, looking to the facts and circumstances of the case, has granted the prayer. The said prayer is granted under Sec. 151 of C.P.C. It is not necessary that such prayer could have been granted by taking separate notice of motion against the present plaintiff. The school wherein the present appellants are the teachers, is having a separate plot just leaving one house between the school and which is called the play ground. In the said play ground, on one side, the school authority should have arranged for parking of their vehicles inside the compound wall of the school and thereby they should not cause any hinderance in ingress and egress of the members of the society. It is the duty of plaintiffs to take all due care for the same. The Ld. Advocate for the defendants Mr. Kinariwala, brought on record the latest position of the school and other plots in the society by appointing Court Commissioner. Finally, it was submitted by the Ld. Advocate for the defendants Mr. Kinariwala,

that there is no illegality or unjustness or perversity in the order passed by the Learned Trial Court in granting the stay in favour of the defendants and against the plaintiffs.

10. Mr. Kinariwala produced authority reported in 1986 (1) 27(1) GLR page 297, in case of Chhatrasinh Mansinh Mahida Vs. Indravadan Ratilal and Ors. and relied on certain observations made by the Apex Court in para 10.

I have gone through the authority. In the case of Chhatrasingh (Supra) it was a matter of election and the court was of the opinion that once the process of election starts, after the issuance of the notification no Court should interfere in the matter including the Election Tribunal. Ultimately, rejecting the notice of motion, the court also discussed the provisions of Art. 227 of the Constitution of India. The Court has observed in para 9 as under:-

Para 9:- "Ordinarily, as a matter of convenience, the superior Court would not exercise its jurisdiction when there is alternative efficacious remedy." Therefore, the facts of the case would not help the present respondent/ original defendant.

12. If we peruse the application exh. 16 given by the defendants, under O. 39, R. 4 of the CPC, it is as good as reply of notice of motion. However, in para 2 it is said that this application is given subject to right to give reply to the notice of motion. In para 10 on page 6 of application Exh. 16, the present defendants have made just reference to have gate/wall in front of the society. In para 11 it is submitted that, a day prior to tender of application exh. 16, the plaintiffs have taken measurements for the construction of wall and gate, therefore, prayed for injunction against the present appellants/original plaintiffs or school management.

The para 12 of the said application, which can be said to be a prayer clause. 12A is regarding vacating the interim injunction granted in favour of the plaintiffs on the ground that they failed to comply the order of the Trial Court. Clause 12B is regarding appointment of the Court Commissioner to prepare a map and submit a report of the present position of the school etc. Clause 12C is in respect of restraining the plaintiffs/present appellants from putting up wall or gate on the road of the society under the guise of ex parte injunction obtained by them, and also prayed for

keeping the gate open for the society.

13. If we peruse the aforesaid three prayers, at para 12A, 12B, and 12C, of the said application, under Order 39, Rule 4 of the Civil Procedure Code, there is no prayer sought by the defendants to pass any order in their favour by allowing them to put a gate or to allow them to construct the wall in front of the society. However, such reliefs, should have been demanded in the prayer clause. Mere cursory reference in application without claiming in a prayer clause, will not give any right to such parties.

14. So far as the contentions of the appellants/original plaintiff are concerned, regarding the road of a school is a public road, and that the school children and teachers have right to park their scooters and cycles on the road of the society concern, there would be through road and neither this society wherein the school is situated nor the adjoining society would have constructed the compound wall by not allowing the persons to pass through. It is not disputed that the school premises is situated in the last plot of the society and the school is having an open plot in the same line by leaving one house in between the school and the plot. It is submitted before me that as per the requirement of the school, the open plot is purchased by the school, however, they are not allowing the students and teachers to park their vehicles in the open plot and ordering them to place their vehicles in front of the school gate and thereby blocks the road of the society.

15. The defendants have right to take out the notice of motion against the appellants/original plaintiffs as per Rule 8, Order 39 of the CPC read with Sub Clause B of Clause A Rule 7, of CPC. The defendants herein have no right to give an application under Order 39 Rule 4 of the C.P.C. The rule 4 of CPC is in respect of "the order for injunction may be discharged, varied or set aside."

In substance, I am of the view that by ordering the defendants to allow to construct the wall and gate, in front of the society by modifying the order of the notice of motion, the Ld. Trial Judge has erred and therefore, the interference of this Court is required.

16. In view of the aforesaid discussion, I am of the opinion that the Trial Court has no powers to grant any prayer under Order 39 Rule 4 of the CPC and that the other side has to make application under Order 39 Rule 8 read with Sub Clause B of Sub Clause (a) of Rule 7 of C.P.Code.

17. Under the circumstances, impugned order cannot be said to be an order according to law. It appears that in exercise of discretionary powers, the learned judge of the trial Court has acted unreasonably, capriciously and has ignored relevant fact and therefore, the impugned order requires to be quashed and set aside. This appeal is therefore, allowed and order dated 6.11.2001, passed below Notice of Motion Ex. 5 & 6, in civil suit No.4752 of 2001, is quashed and set aside.

Learned Trial Court, without being influenced in any manner by the observation made by this Court in the judgment and order, shall dispose of the suit as early as possible.

Accordingly this appeal is allowed with no order as to costs. C.A. disposed of accordingly.

[SHARAD D. DAVE, J]

snt./